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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF WASHINGTON
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9 BRIAN D'AMATO and PAUL D'AMATO,
10 as partners of SIBRO I, SISBRO
11 II, and SISBRO III,

12 Plaintiffs,

13 v.

14 REGINA LILLIE and GERALD LILLIE,
15 as partners of SISBRO I, SISBRO
16 II, and SISBRO III,

17 Defendants.

18 NO. CV-06-0314-EFS

19 **ORDER GRANTING AND DENYING IN
20 PART PLAINTIFFS' MOTION FOR
21 PARTIAL SUMMARY JUDGMENT RE:
22 BREACH OF CONTRACT PARAGRAPH NO.
23 10**

24 On May 5, 2008, a hearing was held in the above-captioned matter.
25 Michael Tucker and Robert Dunn appeared on behalf of Plaintiffs Brian
26 and Paul D'Amato; Stephen Phillabaum appeared on behalf of Defendants
27 Regina and Gerald Lillie. Before the Court was Plaintiffs' Motion for
28 Partial Summary Judgment Re: Breach of Contract Paragraph No. 10. (Ct.
Rec. 129.)¹ Plaintiffs ask the Court to find no genuine issue of

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31 ¹ Also, before the Court, was Defendants' Motion to Strike
32 Affidavit of Anthony D'Amato in Support of Motion for Partial Summary
33 Judgment Re: Breach of Contract Paragraph No. 10. (Ct. Rec. 166.) In
34 advance of the hearing, the Court advised counsel of its rulings on
35 the motion to strike. These rulings are contained in a separate
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1 material fact exists regarding their claim that Defendants breached
 2 Paragraph 10 of the SISBRO partnership agreements. Defendants oppose
 3 the motion. After reviewing the submitted material and relevant
 4 authority and hearing from counsel, the Court is fully informed; this
 5 Order supplements and memorializes the Court's oral ruling granting and
 6 denying in part Plaintiffs' motion.

7 **A. Statement of Facts²**

8 On March 24, 1982, the Articles of SISBRO Limited Partnership
 9 (SISBRO I), which named Regina and Gerald Lillie as general partners,
 10 was executed. (Ct. Rec. 165: Joint Statement of Facts ¶ 1.) Paragraph
 11 10 of the SISBRO I Articles states:

12 10. Salary of General Partners. The general partners shall
 13 be entitled to a salary of SEVEN DOLLARS AND 50/100 CENTS
 14 (\$7.50) per hour for time actually spent in the supervision
 15 and/or operation of the business, which salary shall not
 16 exceed THREE HUNDRED AND NO/100 DOLLARS (\$300.00) per week.
 17 Salaries shall be paid monthly. In addition the general
 18 partners shall be entitled to reimbursement for all necessary
 19 out-of-pocket expenses incurred in conducting the business of
 20 the partnership. The time spent in attending training classes
 21 to learn the operation of the business shall not be included
 22 as salaried time.

23 *Id.* (emphasis added). The Certificate of Limited Partnership of SISBRO

24 Order. (Ct. Rec. 196.)

25 ² In ruling on this motion for summary judgment, the Court
 26 considered the facts and all reasonable inferences therefrom as
 27 contained in the submitted affidavits, declarations, exhibits,
 28 depositions, and the parties' Joint Statement of Uncontroverted Facts
 (Ct. Rec. 165) in the light most favorable to Defendants, the party
 opposing the motion. See *United States v. Diebold, Inc.*, 369 U.S. 654,
 655 (1972) (*per curiam*). The following factual recitation was created
 utilizing this standard.

1 I provides, "The character of the business to be transacted by the
 2 limited partnership would be the management, maintenance, and operation
 3 of a haircutting salon" (hereinafter, the articles and the certificate
 4 are collectively referred to as "the partnership documents"³). *Id.* ¶ 2.
 5 There was no discussion regarding the impact of future salons on the
 6 SISBRO I partnership documents, including Paragraph 10. (Ct. Rec. 134
 7 Ex. A: Gerald Lillie Dep: 39:18-21.)

8 In 1982, the partnership paid Dennis Lillie \$8,065 to manage,
 9 operate, and open the first salon. (Ct. Rec. 165 ¶ 6.) Gerald and
 10 Regina Lillie did not require Dennis Lillie to record or confirm the
 11 hours he worked; and Anthony D'Amato did not suggest to Gerald or Regina
 12 Lillie that Dennis Lillie record the hours he worked. (Ct. Rec. 158:
 13 Regina Lillie Decl. ¶ 25.) Following Dennis Lillie's death in March
 14 1984, Gerald Lillie began working part time for SISBRO I, and Cathy
 15 Nelson performed bookkeeping tasks as an independent contractor. (Ct.
 16 Rec. 165 ¶¶ 8 & 9.)

17 On November 20, 1984, the Articles of the SISBRO II Limited
 18 Partnership (SISBRO II), which listed Gerald and Regina Lillie as
 19 general partners, was executed for a second salon. *Id.* ¶ 3. Paragraph
 20 10 of the SISBRO II Articles is identical to Paragraph 10 of SISBRO I;
 21 likewise, the Certification of Limited Partnership for SISBRO II
 22 identically defines the "character of the business" as SISBRO I's
 23 certification. *Id.* ¶¶ 2 & 3. Regina Lillie left her full-time position

24 ³ In assessing the contract, "Instruments which are part of the
 25 same transaction, relate to the same subject matter and are executed
 26 at the same time should be read and construed together as one
 27 contract," *Turner v. Wexler*, 14 Wn. App. 143, 147 (1975).
 28 ORDER -- 3

1 at United Airlines to manage the two SISBRO partnerships and salons.
2 (Ct. Rec. 158: Regina Lillie Decl. ¶ 18.)

3 On October 4, 1991, the Partnership Agreement of SISBRO III for a
4 limited partnership (SISBRO III), which listed only Gerald Lillie as a
5 general partner, was executed for a third salon. (Ct. Rec. 165 ¶ 5.)
6 Paragraph 10 of the SISBRO III partnership agreement (hereinafter,
7 referred to as "SISBRO III Articles") varies slightly from Paragraph 10
8 of the SISBRO I and II Articles:

9 10. Salary of General Partner. The general partner shall be
10 entitled to a salary of Seven and 50/100 Dollars (\$7.50) per
11 hour for time actually spent in the *management*, supervision
12 and/or operation of the business, which salary shall not
13 exceed Three Hundred Dollars (\$300.00) per week. Such salary
14 shall be paid monthly. The general partner shall be entitled
15 to reimbursement for all necessary out-of-pocket expenses
16 incurred in conducting the business of the partnership. Time
17 spent in attending training classes to learn the operation of
18 the business shall not be included as salaried time.

19 *Id.* (emphasis added to note differences between Paragraph 10 of the
20 SISBRO III Articles and the SISBRO I and II Articles).

21 Since 1991, the number of salons operated by the SISBRO
22 partnerships expanded from three to nineteen in Washington and Idaho.
23 (Ct. Rec. 66 ¶ 2.) Given the hassle associated with obtaining all of
24 the signatures required to execute partnership documents, separate
25 articles and certificates were not executed for the fourth through
26 nineteenth salons; rather, these salons operate under either the SISBRO
27 I, II, or III partnerships. (Ct. Rec. 32 Ex. B: Regina Lillie Dep.
28 37:18 - 38:21.)

29 Since the inception of SISBRO in 1982, the partnerships have paid
30 over \$2,253,555 as "guaranteed payments" to Dennis, Regina, and Gerald
31 Lillie. (Ct. Rec. 165 ¶ 10.) Gerald and Regina Lillie have been the
32 partners who actively worked the business (Ct. Rec. 59: Regina Lillie
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1 Suppl. Decl. 2:4 - 3:3); the other partners have been investment
2 partners only. The Lillies took a \$300.00 weekly payment for each of
3 the salons they oversaw if they are listed as a general partner under
4 the SISBRO Articles. Accordingly, Regina Lillie was paid \$300.00 per
5 week for each of the salons governed by the SISBRO I and II Articles;
6 while, Gerald Lillie was paid \$300.00 per week for each of the salons
7 because he is a general partner under all of the SISBRO Articles. (Ct.
8 Rec. 58: Regina Lillie Decl. ¶¶ 52 & 53; Ct. Rec. 60: Gerald Lillie
9 Decl. ¶ 14.) Gerald and Regina Lillie, who do not dispute that a
10 general partner must work in order to receive payment under Paragraphs
11 10, did not record the hours they worked for the partnerships and/or
12 salons and testified there is no way to reconstruct the hours they
13 worked since 1984. (Ct. Rec. 134 Ex. A: Gerald Lillie Dep. 51:10-17 &
14 70:22 - 71:6; Ct. Rec. 32 Ex. B: Regina Lillie Dep. 50:11-23.) Except
15 when dealing with a particular salon problem, the work done by Gerald
16 and Regina Lillie benefitted all of the salons. (Ct. Rec. 158: Regina
17 Lillie Decl. 2:12-14; Ct. Rec. 134: Regina Lillie Dep. 51:19 - 54:4.)

18 From 1982 to 1999, Gerald Lillie mailed financial statements to the
19 partners, along with checks. (Ct. Rec. 60: Gerald Lillie Decl. ¶ 8.)
20 These statements identified the Lillies' weekly salaries as "guaranteed
21 payments." *Id.*; see also Ct. Rec. 63: Norma Kraus Decl. ¶ 4 & Ex. A.
22 No objections were made to these guaranteed payments. Gerald Lillie
23 quit sending financial statements to the partners in 1999. (Ct. Rec.
24 60: Gerald Lillie Decl. ¶ 9.)

25 Gerald and Regina Lillie are entitled to 72% of all distributions
26 by the SISBRO partnerships. (Ct. Rec. 165 ¶ 11.) Due to Gerald and
27 Regina Lillie's hands-on approach to managing the salons, they were able
28 ORDER -- 5

1 to avoid hiring a number of mid-level managers, thereby keeping expenses
2 low and increasing dividends to the partners. (Ct. Rec. 158: Regina
3 Lillie Decl. ¶ 4.)

4 On June 8, 2007, the Court denied Plaintiffs' Motion for Partial
5 Summary Judgment, "finding there exist genuine issues of material fact
6 as to whether the contracting parties intended the \$300 salary cap for
7 the general partners to be limited to a single weekly payment for the
8 entire partnership or a payment for each salon." (Ct. Rec. 70.) The
9 parties then engaged in discovery and filed additional motions for
10 summary judgment.

11 **B. Summary Judgment Standard**

12 Summary judgment is appropriate if the "pleadings, depositions,
13 answers to interrogatories, and admissions on file, together with the
14 affidavits, if any, show that there is no genuine issue as to any
15 material fact and that the moving party is entitled to judgment as a
16 matter of law." FED. R. CIV. P. 56(c). Once a party has moved for
17 summary judgment, the opposing party must point to specific facts
18 establishing that there is a genuine issue for trial. *Celotex Corp. v.*
19 *Catrett*, 477 U.S. 317, 324 (1986). If the nonmoving party fails to make
20 such a showing for any of the elements essential to its case for which
21 it bears the burden of proof, the trial court should grant the summary
22 judgment motion. *Id.* at 322. "When the moving party has carried its
23 burden of [showing that it is entitled to judgment as a matter of law],
24 its opponent must do more than show that there is some metaphysical
25 doubt as to material facts. In the language of [Rule 56], the nonmoving
26 party must come forward with 'specific facts showing that there is a
27 genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio*

1 *Corp.*, 475 U.S. 574, 586-87 (1986) (citations omitted) (emphasis in
 2 original opinion).

3 When considering a motion for summary judgment, a court should not
 4 weigh the evidence or assess credibility; instead, "the evidence of the
 5 non-movant is to be believed, and all justifiable inferences are to be
 6 drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255
 7 (1986). This does not mean that a court will accept as true assertions
 8 made by the non-moving party that are flatly contradicted by the record.
 9 See *Scott v. Harris*, 127 S. Ct. 1769, 1776 (2007).

10 **C. Legal Authority and Analysis**

11 The Court applies the law of the forum state to determine whether
 12 Gerald and Regina Lillie breached Paragraph 10 of the SISBRO I, II, and
 13 III Articles by taking a \$300.00 weekly salary without keeping a record
 14 of hours worked.⁴ See *Nelson v. Int'l Paint Co.*, 716 F.2d 640, 643 (9th
 15 Cir. 1983). Here, the SISBRO I and II partnership documents relate to
 16 salons in Washington; while, the SISBRO III partnership documents govern
 17 salons in Idaho. Consistent with its prior Order (Ct. Rec. 70), the
 18 Court determines it need not decide whether Washington or Idaho law
 19 applies to the partnership documents because the Court reaches the same

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21 ⁴ Although a court may typically interpret a contract as a
 22 matter of law on summary judgment, summary judgment is appropriate
 23 when extrinsic evidence is considered only if one reasonable meaning
 24 can be drawn from the extrinsic evidence. *Valve Corp. v. Sierra*
 25 *Entm't*, 431 F. Supp. 2d 1091, 1095 (W.D. Wash. 2004); *Spectrum Glass*
 26 *Co. v. Pub. Util. Dist. No. 1 of Snohomish City*, 129 Wn. App. 303,
 27 311-12 (2005).

1 conclusion under both Washington and Idaho law.

2 To interpret the partnership documents, the Court ascertains the
3 parties' intent by using the "context rule." *Spectrum Glass Co. v. Pub.*
4 *Util. Dist. No. 1 of Snohomish City*, 129 Wn. App. 303, 311-12 (2005)
5 (citing *Berg v. Hudesman*, 115 Wn.2d 657, 667 (1990)); see also
6 *Farnsworth v. Dairyman's Creamery Ass'n*, 125 Idaho 866, 870 (1994). The
7 context rule allows the court to consider extrinsic evidence, including
8 the following, to ascertain the parties' intent:

9 (1) the subject matter and objective of the contract, (2) the
10 circumstances surrounding the making of the contract, (3) the
11 subsequent conduct of the parties to the contract, (4) the
12 reasonableness of the parties' respective interpretations, (5)
13 statements made by the parties in preliminary negotiations,
14 (6) usages of trade, and (7) the course of dealing between the
15 parties. Such evidence is admissible regardless of whether
16 the contract language is deemed ambiguous.

17 *Spectrum Glass Co.*, 129 Wn. App. at 310-11 (internal citations omitted).
18 The purpose of extrinsic evidence is to "illuminate what was written,
19 not what was intended to be written." *Id.* Therefore, extrinsic
20 evidence cannot be used: "(a) to show a party's unilateral or subjective
21 intent as to the meaning of a contract word or term; (b) to show an
22 intention independent of the instrument; or (c) to vary, contradict, or
23 modify the written word." *Id.*

24 After considering the language of Paragraphs 10 and the extrinsic
25 evidence submitted by the parties, the Court concludes, as a matter of
26 law, that Paragraphs 10 require the general partner to "work;"
27 therefore, Plaintiffs' motion is granted in part. However, the
28 remainder of Plaintiffs' motion is denied. First, Gerald and Regina
Lillie testified that they actually spent time "in the supervision
and/or operation of the business." (SISBRO Articles ¶ 10.) Second, the

1 Court finds there is more than one reasonable interpretation of the
2 phrase, "per hour for time actually spent in the supervision and/or
3 operation of the business." *Id.* One reasonable interpretation is that
4 proposed by Plaintiffs, i.e. the general partner was required to keep
5 a time record in order to take a salary commiserate with that record.
6 However, another reasonable interpretation of this phrase, is that
7 proposed by Defendants, i.e. the general partner had to work to take a
8 salary, however, time records need not be kept. This interpretation is
9 supported by the subsequent conduct of the parties to the partnership
10 agreements. It is undisputed that the partners did not ask for
11 verification of hours worked by the Lillies even though the distributed
12 financial records indicated that the Lillies took "guaranteed payments"
13 consistent with a \$300.00 weekly salary per salon.

14 For these reasons, the Court finds genuine issues of material fact
15 exist; Plaintiffs' motion is denied in part. At trial, the jury must
16 determine whether the parties intended to require a general partner to
17 keep a record of hours worked in order to take the calculated salary.
18 If the jury determines the parties so intended, then Gerald and Regina
19 Lillie breached Paragraphs 10 by taking a salary without a record of
20 hours worked. However, if the jury determines it was not the parties'
21 intent to require a record of hours worked, the jury must then, in
22 addition to determining whether the Lillies "worked," determine whether
23 a general partner's work time could be credited to more than one
24 partnership and/or salon ("a common benefit to all"), i.e. whether eight
25 hours of work benefitting all of the SISBRO partnerships could account
26 for eight hours of work for each of the salons, thereby totaling 152
27 hours.

28 ORDER -- 9

1 For the above given reasons, **IT IS HEREBY ORDERED:** Plaintiffs'
2 Motion for Partial Summary Judgment Re: Breach of Contract Paragraph No.
3 10 (**Ct. Rec. 129**) is **GRANTED IN PART** (general partner must work in order
4 to take a salary) **and DENIED IN PART** (whether general partner was
5 required to keep record of hours worked).

6 **IT IS SO ORDERED:** The District Court Executive shall enter this
7 Order and forward copies to counsel.

8 **DATED** this 20th day of May 2008.

9
10 S/ Edward F. Shea
11 EDWARD F. SHEA
12 UNITED STATES DISTRICT JUDGE

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28 ORDER -- 10